

**In re: H.C. MACCLAREN, INC.**  
**PACA Docket No. D-99-0012.**  
**Decision and Order.**  
**Filed November 8, 2001.**

**Alteration of inspection certificates – False accounts of sales – Egregious violation defined – Willful violations – Flagrant and repeated violations – Liability for employee violations – Reason to know – Sanction recommendation – Sanction policy – Civil penalty – License revocation.**

The Judicial Officer (JO) revoked Respondent's PACA license for making false and misleading statements, for a fraudulent purpose, in connection with transactions involving perishable agricultural commodities in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The JO found that Respondent's employees altered 53 United States Department of Agriculture (USDA) inspection certificates and made eight false accounts of sales resulting in Respondent's underpayment to its produce suppliers and/or brokers of \$137,502.15. The JO found that Respondent's employees acted within the scope of their employment when they altered the USDA inspection certificates and made the false accounts of sales; therefore, the JO concluded, as a matter of law, that Respondent was responsible for its employees' violations (7 U.S.C. § 499p). The JO rejected Respondent's request for the assessment of a civil penalty and reversed the Chief ALJ's assessment of a \$50,000 civil penalty stating that Respondent's violations were egregious and egregious violations warranted either suspension or revocation of the violator's PACA license. The JO held the Chief ALJ erroneously failed to find that Respondent's violations were willful. The JO found Complainant failed to prove by a preponderance of the evidence that Respondent's principals knew of the violations but found that Respondent's principals should have known of the violations. The JO rejected Complainant's contention that the Chief ALJ's failure to discuss more of the violative transactions and the testimony of each of Complainant's witnesses were error. The Judicial Officer rejected Respondent's contention that the assessment of civil penalties in similar cases which were settled by the entry of consent decisions should determine the sanction in the proceeding. The Judicial Officer stated that consent orders are given no weight in determining the sanction in a litigated case.

Eric Paul and Ruben D. Rudolph, Jr., for Complainant.  
Stephen P. McCarron, for Respondent.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## **PROCEDURAL HISTORY**

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on June 17, 1999. Complainant instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period June 1994 through November 1996, H.C. MacClaren, Inc. [hereinafter Respondent], made, for a

fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent altered 53 United States Department of Agriculture inspection certificates to falsely indicate the percentage of defects, the range of defects, the number of cartons, and/or the temperature range of perishable agricultural commodities and, in one case, the inspection applicant's name; (2) Respondent submitted the 53 United States Department of Agriculture inspection certificates to 22 of Respondent's suppliers and/or brokers and, as a result, Respondent underpaid these 22 suppliers and/or brokers \$130,903; (3) during the period June 1994 through November 1996, Respondent made, for a fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent made false accounts of sale that incorrectly reported the net proceeds that Respondent received for its sale of perishable agricultural commodities in interstate commerce; (4) Respondent submitted these false accounts of sale to seven of Respondent's suppliers and, as a result, Respondent paid these seven suppliers \$6,599.15 less than it would have paid if the accounts of sale had been accurate; and (5) Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-V). On July 7, 1999, Respondent filed an "Answer to Complaint" denying the material allegations of the Complaint.

On September 20 and 21, 2000, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Detroit, Michigan. Eric Paul and Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Respondent.

On December 4, 2000, Respondent filed "Brief of Respondent," and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order." On December 12, 2000, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order (with Revised Transcript Citations)" [hereinafter Complainant's Post-Hearing Brief]. On January 3, 2001, Respondent filed "Reply Brief of Respondent" and Complainant filed "Reply Brief."

On March 23, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that during the period June 1994 through November 1996, Respondent, by altering United States Department of Agriculture inspection certificates and accounts of sales, made, for a fraudulent purpose, false and misleading statements in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) assessed Respondent a \$50,000 civil penalty (Initial Decision and Order at 18).

On May 23, 2001, Complainant appealed to the Judicial Officer. On July 19, 2001, Respondent filed "Respondent's Opposition to Complainant's Appeal Petition." On September 11, 2001, the Hearing Clerk transmitted the record of the

proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except for the sanction imposed by the Chief ALJ against Respondent. Therefore, except for the Chief ALJ's sanction, the Chief ALJ's discussion of the sanction, and other minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law as restated.

Complainant's exhibits are designated by "CX." York Stenographic Services, Inc., the court reporting company responsible for transcribing the September 2000 hearing, provided a transcript on October 13, 2000. This October 13, 2000, transcript is in two volumes. One volume of the transcript relates to the segment of the hearing conducted on September 20, 2000, and contains pages numbered 2 through 291. The second volume of the transcript relates to the segment of the hearing conducted on September 21, 2000, and contains pages numbered 2 through 204. The Hearing Clerk requested that York Stenographic Services, Inc., provide a second transcript with the pages sequentially numbered. York Stenographic Services, Inc., provided the second transcript in which the pages are numbered 2 through 466. The Chief ALJ's Initial Decision and Order references the October 13, 2000, transcript. Therefore, in this final Decision and Order, I reference the October 13, 2000, transcript, to wit: references in this Decision and Order to "Tr. Vol. I" relate to the September 20, 2000, hearing transcript segment; and references to "Tr. Vol. II" relate to the September 21, 2000, hearing transcript segment.

## **APPLICABLE STATUTORY PROVISIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

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#### **CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

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##### **§ 499b. Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

#### **§ 499h. Grounds for suspension or revocation of license**

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

##### **(e) Alternative civil penalties**

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number

of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

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**§ 499n. Inspection of perishable agricultural commodities**

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**(b) Issuance of fraudulent certificates; penalties**

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

....

**§ 499p. Liability of licensees for acts and omissions of agents**

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), (e), 499n(b), 499p.

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

At the hearing, Respondent did not deny that three of its employees altered 53 United States Department of Agriculture inspection certificates and made eight false accounts of sales during the period June 1994 through November 1996, as alleged in the Complaint (Tr. Vol. I at 6). The evidence presented by Complainant establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, three of Respondent's commission-paid salespersons, altered the United States Department of Agriculture inspection certificates in the course of their employment. Norman Olds and Frederick Gottlob each altered 26 United States Department of Agriculture inspection certificates. Alan Johnston altered one United States Department of Agriculture inspection certificate. Complainant estimated that Respondent gained \$85,498.30 from Norman Olds' alterations, \$44,743.20 from Frederick Gottlob's alterations, and \$661.50 from Alan Johnston's alteration. (CX 12-CX 60.) Respondent did not challenge Complainant's estimates which were attached as Appendix A to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix A to this Decision and Order and incorporated in this Decision and Order by reference.

The evidence presented by Complainant establishes that Norman Olds and Frederick Gottlob made eight false accounts of sales in the course of their employment. Norman Olds made one false account of sale and Frederick Gottlob made seven false accounts of sales. Complainant estimated that Respondent gained \$485.25 from Norman Olds' false account of sale and \$6,113.90 from Frederick Gottlob's seven false accounts of sales. (CX 61-CX 68.) Respondent did not challenge Complainant's estimates which were attached as Appendix B to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix B to this Decision and Order and incorporated in this Decision and Order by reference.

The following are examples of the transactions in which Norman Olds, Frederick Gottlob, and Alan Johnston made alterations.

**Inspection Certificate M-910462-1.** United States Department of Agriculture inspection certificate M-910462-1 relates to a f.o.b. purchase by Respondent on April 19, 1995, of 920 cartons of iceberg lettuce from Dole Fresh Vegetables, Inc. The United States Department of Agriculture inspector found some decay in the lettuce and the shipping temperature of the lettuce (42 to 46 degrees) was excessive for the commodity. Norman Olds, who handled this transaction, altered the United States Department of Agriculture inspection certificate to show that the temperature was within shipping contract specifications (37 to 41 degrees) to make it appear that the decay was not attributable to the high shipping temperature. Norman Olds then negotiated a \$15,640 reduction in the amount Respondent owed Dole Fresh Vegetables, Inc. (CX 21.)

**Inspection Certificate K-164560-5.** United States Department of Agriculture inspection certificate K-164560-5 relates to a purchase on March 23, 1996, of lettuce by Respondent from Anderson Farms. Frederick Gottlob handled the

transaction and altered the United States Department of Agriculture inspection certificate to increase the number of United States Department of Agriculture-inspected containers from 160 to 460 to increase the extent of the damage found in the lettuce. Frederick Gottlob was then, because of the misrepresentation, able to negotiate a \$2,887.80 reduction in the amount Respondent owed Anderson Farms and increase the amount of his commission. (CX 41.)

The Anderson Farms transaction was also one of the eight false accounts of sales (CX 61-CX 68). These false accounts of sales involved arrangements between Respondent and shippers whereby Respondent handled produce for a shipper's account. Frederick Gottlob altered the records in the Anderson Farms account to change the gross proceeds of the transaction from \$2,681 to \$2,232; expenses from \$1,192.20 to \$1,639.50; and net proceeds from \$1,488.80 to \$592.50. Frederick Gottlob's false accounting understated the actual net proceeds by \$896.30. (CX 65.)

**Inspection Certificate K-164203-2.** United States Department of Agriculture inspection certificate K-164203-2, the only inspection certificate altered by Alan Johnston, was changed by Alan Johnston to double the number of inspected cartons of apples purchased on February 20, 1996, from Hansen Fruit & Cold Storage Co., Inc., from 49 to 98. This alteration had the effect of increasing the number of defects. Based on this alteration, Alan Johnston obtained a \$705.50 reduction in the amount owed Hansen Fruit & Cold Storage Co., Inc. Alan Johnston said he made the change in the United States Department of Agriculture inspection certificate to correct a counting error by the inspector. (CX 37.)

The evidence clearly establishes that Respondent's employees made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales. As Respondent's salespersons willfully committed these unlawful acts in the scope of their employment, the acts are deemed to be the acts of Respondent (7 U.S.C. § 499p).<sup>1</sup> Accordingly, I find Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

As for the sanction for the violations, Complainant contends Respondent's PACA license should be revoked (Complainant's Post-Hearing Brief at 40). Respondent requests the assessment of a civil money penalty of \$100,000 or less (Brief of Respondent at 6).

Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209. Pursuant to the licensing provisions of the PACA, Respondent was issued PACA license number 740476 on September 18, 1974. Respondent's

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<sup>1</sup> See also *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 1996).

PACA license has been renewed annually. (Answer to Complaint ¶ 2.)

Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia. (Tr. Vol. II at 40-41, 87; CX 6 at 1, CX 7 at 19.) Gregory MacClaren and Darrell Moccia, together with four salespersons, buy and sell produce for the company. They all work in the same area with raised dividers separating the desks and handle about 400 transactions a month. (Tr. Vol. I at 23-25, 133-34, 232-33; Tr. Vol. II at 41-42.)

Each transaction has its own file. The salesperson handling a transaction places identifying initials on the outside file jacket and writes on the jacket the amount of the invoice which is used by an office worker to pay the invoice and calculate the salesperson's commission. United States Department of Agriculture inspection certificates, invoices, and other records relating to the transaction are placed in the file. (Tr. Vol. I at 29, 50; Tr. Vol. II at 69-70.) Darrell Moccia testified that, prior to the United States Department of Agriculture's investigation, he did not routinely look in the files prepared by the salespersons, except when he received a complaint from a shipper. He said he had relied on the office staff to bring any problems to his attention. (Tr. Vol. II at 51-54.)

In December 1996, United States Department of Agriculture investigators visited Respondent's place of business for the purpose of checking on a transaction involving another company that was under investigation for possible altered United States Department of Agriculture inspection certificates. When the investigators checked Respondent's file relating to this transaction, they found two copies of the same United States Department of Agriculture inspection certificate. The two copies contained conflicting entries. Neither Gregory MacClaren nor Darrell Moccia could explain the discrepancy. The United States Department of Agriculture investigators then looked at 36 files and found the entries on the United States Department of Agriculture inspection certificates in 11 of the files handled by Norman Olds, Frederick Gottlob, and Alan Johnston did not match the entries on the United States Department of Agriculture's copies of the certificates. (Tr. Vol. I at 9-15.) Norman Olds, Frederick Gottlob, and Alan Johnston admitted making alterations to the United States Department of Agriculture inspection certificates (Tr. Vol. I at 18-23, 131-33, 225-28, 263-64; CX 3 at 2-4). Gregory MacClaren and Darrell Moccia told the investigators that they were unaware of the alterations but that they wanted to cooperate and do what was necessary to get "to the bottom" of the matter. They then instituted their own investigation. Darrell Moccia told Norman Olds "if you did it, you might as well get everyone [sic] of [the files] out and let's get it out in the open. Because if there's [sic] ill gains in it in our books, I want them out, I want to pay the bills." (Tr. Vol. II at 44-45.)

Darrell Moccia and Gregory MacClaren then had Norman Olds, Alan Johnston, and Frederick Gottlob go through their files to find and retrieve any altered United



States Department of Agriculture inspection certificates (Tr. Vol. I at 20, 264-65). Norman Olds testified that he and his wife went through his files involving all the transactions he handled in his 7 years with Respondent (Tr. Vol. I at 266). He gave the files with altered United States Department of Agriculture inspection certificates to a United States Department of Agriculture investigator who observed that some of the file jackets for the transactions handled by Norman Olds contained the initials "DNM" rather than "NO." DNM are the initials of Darrell N. Moccia. Norman Olds and Darrell Moccia testified that Norman Olds had used the initials DNM for some transactions because of a 2-year "no-compete" agreement that Norman Olds had with the produce company for whom he worked before being hired by Respondent. Norman Olds, with Darrell Moccia's concurrence, had put the initials DNM rather than his own initials, NO, on the jacket files for those transactions he handled that involved companies that also did business with his former employer to avoid a conflict with the no-compete agreement. Darrell Moccia put the initials DM on the transactions he handled to distinguish them from the DNM transactions handled by Norman Olds. The office workers who paid the invoices and computed the commissions knew that files with the initials DNM meant Norman Olds and those with DM meant Darrell Moccia. (Tr. Vol. I at 193-94, 213-15, 255-57, 281-82.)

Norman Olds, Alan Johnston, and Frederick Gottlob gave statements to United States Department of Agriculture investigators admitting that they had altered United States Department of Agriculture inspection certificates. They each stated that Gregory MacClaren and Darrell Moccia were not aware of their actions. (CX 3 at 2-4; Tr. Vol. I at 228-29.) Frederick Gottlob added in his statement that he had acted "independently" (CX 3 at 3). However, at the hearing Frederick Gottlob testified that, while his statement was true "at the time" he prepared it, he was told by Norman Olds some months later that Gregory MacClaren and Darrell Moccia had been aware that the United States Department of Agriculture inspection certificates were being altered. He said that Norman Olds was a partner in the business, a supervisor, and the office manager, that he had gotten the idea to alter certificates from Norman Olds, that Norman Olds showed him how to make the alterations, and that the alterations were a secret between he and Norman Olds. Frederick Gottlob said the practice of altering the United States Department of Agriculture inspection certificates had started after Norman Olds began working for Respondent, which was about 2 years after Frederick Gottlob's date of employment. However, he hedged this assertion when asked if he had altered any United States Department of Agriculture inspection certificates before Norman Olds' arrival, with the response "It's possible that I did. I'm not sure." (Tr. Vol. I at 132, 144, 152, 157-58, 172.)

As for falsifying accounts of sales, the record shows that Frederick Gottlob, who called the practice "creaming the file," was responsible for seven of the eight accounts of sales that Complainant alleges were falsified (CX 61-CX 63, CX 65-CX

68). Frederick Gottlob, however, implied that other salespersons had also falsified accounts of sales by claiming that it “was a common practice in the office” and that Greg MacClaren was aware of it. He also asserted that everyone joked about the practice (Tr. Vol. I at 135-36, 167). Frederick Gottlob named Daniel Schmidlin as one of the salespersons he saw falsifying an account of sale and said Gregory MacClaren had made up a letterhead to create a false account of sale for a transaction with a company called Metro Produce. However, he qualified his assertion by saying that he did not know whether Gregory MacClaren had falsified the account. He also said that he learned the “white-out trick” that he used to alter United States Department of Agriculture inspection certificates from Gregory MacClaren who had used white-out on documents to be used for a shipment to Canada. (Tr. Vol. I at 135-37, 159, 161-62, 166-68.) Gregory MacClaren explained that he had sometimes re-used manifest papers for the shipment of grapes to Canada by using white-out to create a blank manifest form to write in the information for a new shipment of grapes. He said no false information was put on the forms. (Tr. Vol. II at 106-07, 138-40.) Complainant does not allege that this practice was unlawful.

Daniel Schmidlin, who was not alleged to have altered United States Department of Agriculture inspection certificates or to have made false accounts of sales, testified that he was not aware that Norman Olds or Frederick Gottlob or anyone at Respondent altered United States Department of Agriculture inspection certificates or made false accounts of sales until the United States Department of Agriculture conducted its investigation. He also said that Norman Olds was just another salesperson and was not his supervisor. (Tr. Vol. I at 242-50.)

Norman Olds testified that he was not a supervisor but that, under the terms of his employment with Respondent, he was to receive 10 percent of the company’s stock after being there 10 years. He said he never told Frederick Gottlob or anyone at the company that he had altered United States Department of Agriculture inspection certificates and was unaware that Frederick Gottlob had also altered them. (Tr. Vol. I at 265-66, 278-81.)

Perry Chiarelli, who worked for Respondent for about 6 weeks as a salesperson, said he received training from Darrell Moccia on being a buyer and broker and received coaching from Norman Olds on dealing with trucking companies and growers. He testified that Norman Olds was Respondent’s best salesperson and was “kind of like our supervisor” (Tr. Vol. I at 183). Perry Chiarelli said he saw Norman Olds alter a United States Department of Agriculture inspection certificate and quit a week later. When Gregory MacClaren asked him why he was quitting, Perry Chiarelli responded that he was not comfortable working with “scoundrels.” However, he said he did not go into specifics with Gregory MacClaren as to the persons he regarded as scoundrels, but testified that he meant “not only the buyers but the growers and even the brokers, just the industry as I had seen it firsthand” (Tr. Vol. I at 184). He also talked to Darrell Moccia when he quit but said he did

not remember whether he used the word scoundrel with Darrell Moccia. He said he told Darrell Moccia that United States Department of Agriculture inspection certificates were being altered but then said he was not sure whether he had actually used the word "alterations" in his conversation with Darrell Moccia and that he may have said "I was not comfortable with what Norm [Olds] was doing as far as the inspections I could have said." (Tr. Vol. I at 175-80, 183-84, 187-88.)

Jayne Mounce, one of Respondent's office workers, said that Norman Olds was a supervisor but that she never saw him directing the other salespersons. She also said she was not aware that United States Department of Agriculture inspection certificates had been altered until the time of the United States Department of Agriculture investigation. (Tr. Vol. I at 194-95, 213-14.)

Alan Johnston, who admitted altering a United States Department of Agriculture inspection certificate after a United States Department of Agriculture inspector made a mistake in counting the number of cartons in a shipment from Hansen Fruit & Cold Storage Co., Inc., said he called Hansen Fruit & Cold Storage Co., Inc., about the inspector's mistake and told them that he had altered the United States Department of Agriculture inspection certificate to reflect the correct count. He said that Hansen Fruit & Cold Storage Co., Inc., did not "have a problem with that." Alan Johnston, however, followed up with a letter to Hansen Fruit & Cold Storage Co., Inc., to document what he had done because he said he realized he should not have altered the United States Department of Agriculture inspection certificate. He said he sat next to Norman Olds but was not aware that Norman Olds or Frederick Gottlob had altered United States Department of Agriculture inspection certificates. (Tr. Vol. I at 225-38; CX 3 at 4.)

Norman Olds and Frederick Gottlob offered to resign from the company, but Gregory MacClaren gave them the option of staying and paying Respondent the amount it owed the produce shippers because of the altered United States Department of Agriculture inspection certificates. Gregory MacClaren told them "we're going to try to work through this" by making restitution to the shippers. Norman Olds and Frederick Gottlob were told to call all shippers who were affected by the altered United States Department of Agriculture inspection certificates and Gregory MacClaren made follow-up calls to the same shippers. He testified that he has paid back almost 100 percent of the amounts Respondent underpaid shippers because of the alterations. (Tr. Vol. II at 98-103, 109.)

Norman Olds continued working as a salesperson with an agreed upon amount deducted from his pay as restitution to cover the loss caused by his misdeeds. Frederick Gottlob continued working for another month and a half. However, Gregory MacClaren and Darrell Moccia said Frederick Gottlob's attitude changed and when his sales would equal his "draw," he would stop making sales. Darrell Moccia said that Frederick Gottlob "kept spouting off that he had a wife that had a good job and he didn't really need to work hard and make a lot of money." Frederick Gottlob, who testified after receiving a grant of immunity from federal

criminal prosecution, admitted that he did not have the “greatest attitude.” Gregory MacClaren fired Frederick Gottlob in April 1997 after an encounter over Frederick Gottlob’s work performance. Respondent sued Frederick Gottlob, Frederick Gottlob countersued, but the suits were later dropped by both sides. Frederick Gottlob left the company without paying any restitution to Respondent. (Tr. Vol. I at 138, 152, 155-57, 172-73, 275, 288-89; Tr. Vol. II at 49-50, 90, 104-09.)

### **Discussion**

Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or revocation. 7 U.S.C. § 499h(e). The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and provides one example of a violation of the PACA in which a civil penalty, rather than license revocation or suspension, might be appropriate, as follows:

#### *Section 11—Imposition of civil penalty in lieu of suspension or revocation*

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity’s license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207, at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, supported expansion of authority to assess civil penalties during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 12, 34 (1995).

The Administrator, Agricultural Marketing Service, also submitted a written statement, which was made part of the record of the hearing, stating that license suspension or revocation is appropriate for egregious violations of the PACA, as follows:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995).

The Administrator of the Agricultural Marketing Service's statements make clear that, although the United States Department of Agriculture supported the 1995 amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious" violations of the PACA.

"Egregious" is defined as "conspicuously bad" (Webster's Collegiate Dictionary 369 (10th ed. 1997)). The intentional alteration and falsification of United States Department of Agriculture inspection certificates and making of false accounts of sales for a fraudulent purpose that cause produce shippers monetary loss clearly meets this definition of egregious. The alteration of United States Department of Agriculture inspection certificates is particularly egregious because these certificates play a critical role in the produce industry. Steven J. Koran, regional sales manager for Dole Fresh Vegetables, Inc., one of the produce suppliers Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified regarding the role of United States Department of Agriculture inspection certificates, as follows:

[BY MR. PAUL:]

Q. Okay. Please indicate to me what role do USDA inspections play in the produce business.

[BY MR. KORAN:]

A. The role of the USDA inspections is pretty much our eyes and ears for any sort of quality claims. It's pretty much the only method we have to settle any disputes on quality grade.

Q. What is Dole's practice with respect to the use of inspections or requiring of inspection certificates?

A. Pretty much any time there's a quality issue we require an inspection to be taken before any adjustment be taken off of the file from the agreed upon FOB price.

Q. If a receiver requests an adjustment, do you ever grant one without an inspection?

A. On very rare occasions if the quantity of the item is insignificant but not very often.

Tr. Vol. I at 62-63.

Similarly, Cloyse Edward Little, the general manager of Mills Distributing Company, a produce supplier Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified that United States Department of Agriculture inspection certificates play an extremely important role in the produce industry (Tr. Vol. I at 85-86). The important role of United States Department of Agriculture inspection certificates is reflected in section 14(b) of the PACA (7 U.S.C. § 499n(b)) which makes the alteration of a United States Department of Agriculture inspection certificate a criminal offense.

Complainant contends Respondent knew that Norman Olds, Frederick Gottlob, and Alan Johnston altered United States Department of Agriculture inspection certificates and that Norman Olds and Frederick Gottlob made false accounts of sales or, if it did not know, Respondent's lack of knowledge was due to its willful ignorance and Respondent's PACA license should therefore be revoked (Complainant's Post-Hearing Brief at 28-33).

The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employees, Norman Olds, Frederick Gottlob, and Alan Johnston, were acting within the scope of their employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employees are deemed to be knowing and willful

violations by Respondent (7 U.S.C. § 499p).<sup>2</sup>

The evidence offered to establish Respondent's owners, Gregory MacClaren and Darrell Moccia, knew that United States Department of Agriculture inspection certificates were being altered was the testimony of Perry Chiarelli and Frederick Gottlob. Perry Chiarelli, however, could not recall whether he had told Gregory MacClaren and Darrell Moccia that Norman Olds had altered a United States Department of Agriculture inspection certificate or whether he had just complained that he was quitting because he considered everyone connected with the produce industry "scoundrels."

As for Frederick Gottlob's testimony, it was too inconsistent and unsubstantiated to be given much credence. He first gave a statement that he said was true "at the time" that he had acted independently and that Gregory MacClaren and Darrell Moccia were unaware of his misdeeds. He then changed his statement by testifying that he had started altering United States Department of Agriculture inspection certificates at Norman Olds' instigation and that he had later learned from Norman Olds that Gregory MacClaren and Darrell Moccia had known of their actions. He then even changed this statement by conceding that he may have started altering United States Department of Agriculture inspection certificates before Norman Olds was employed by Respondent. He claimed Norman Olds was not only a salesperson but also a partner, a supervisor, and office manager. Norman Olds was a potential partner and a top salesperson who "supervised" to the extent of coaching Perry Chiarelli on how to become a salesperson, but there is no evidence that he had the authority or responsibility of a supervisor or an office manager. Moreover, if Norman Olds were a supervisor or manager, it would have meant that, with Gregory MacClaren and Darrell Moccia working in the same area, there would have been the very unlikely ratio of three supervisors and managers to three salespersons.

Finally, Frederick Gottlob, who was responsible for seven of the eight false accounts of sales, claimed that falsifying accounts of sales was such a common practice everyone joked about it. He specifically named Daniel Schmidlin and Gregory MacClaren as two of the other culprits. There was a lack of corroboration for this assertion, and I do not find Frederick Gottlob a credible witness. His testimony has little value. I find Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before the violations were discovered during a United States Department of Agriculture investigation in December 1996.

However, I find Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during a United States Department of Agriculture investigation. Commission merchants, brokers, and

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<sup>2</sup>See note 1.



dealers are prohibited from: (1) making, for a fraudulent purpose, any false or misleading statement in connection with a transaction involving any perishable agricultural commodity; (2) failing to truly and correctly account in respect of any transaction in any perishable agricultural commodity to the person with whom the transaction is had; and (3) failing, without reasonable cause, to perform any specification of duty, express or implied, arising out of any undertaking in connection with a transaction involving a perishable agricultural commodity. (7 U.S.C. § 499b(4)). Cloyse Edward Little, the general manager of Mills Distributing Company, who supervises seven salespersons and has been in the produce industry since 1956, testified that he examines the salespersons' transaction files, including inspection certificates, to evaluate their performance and commissions and that a manager cannot do an adequate job of managing unless he or she reviews the salespersons' transactions files (Tr. Vol. I 93-94). Similarly, Jane E. Servais, Complainant's sanction witness, testified as to the responsibilities of a principal of a PACA licensee to review its salespersons' transaction files, as follows:

BY MR. PAUL:

Q. Now, Ms. Servais, does the agency consider that licensees have a responsibility to have true and accurate records?

[BY MS. SERVAIS:]

A. Yes.

Q. And to supervise their employees in the preparation of such records?

A. They have to provide oversight. They are responsible for the acts of their employees.

Q. And you've heard the testimony that the Respondent's principles [sic] have indicated as to not looking in file jackets. And does that conform with your understanding of appropriate supervision?

A. I don't think any supervisor looks over every employee on every single transaction. But there are checks and balances in place in all businesses, or should be. The fact that they should have, and had opportunity and had access to these files, yes, I do believe they should have, at least on a random sampling basis, check over what their employees were doing.

Tr. Vol. II at 182-83.

In light of the prohibitions in section 2(4) of the PACA (7 U.S.C. § 499b(4)), Gregory MacClaren's and Darrell Moccia's failure to review at least a portion of the transaction files prepared by Respondent's salespersons constitutes gross negligence. Given the large number of altered United States Department of Agriculture inspection certificates and false accounts of sales, Gregory MacClaren's and Darrell Moccia's review of a portion of the transaction files prepared by Respondent's salespersons would likely have resulted in Gregory MacClaren's and Darrell Moccia's discovery of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) prior to December 1996.

Complainant contends PACA license revocation is the only appropriate sanction in this case because the "message" a monetary penalty would send to Respondent and other regulated produce brokers and dealers is that the sanction for altering United States Department of Agriculture inspection certificates and making false accounts of sales is only a "cost of doing business" (Tr. Vol. II at 180).

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant's sanction witness, Ms. Servais, an administrative official charged with the responsibility for achieving the purposes of the PACA, recommended the revocation of Respondent's PACA license and provided the reasons for her recommendations, including the seriousness of Respondent's violations, the number of Respondent's violations, the time during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, and the mitigating and aggravating circumstances relevant to Respondent's violations<sup>3</sup> (Tr. Vol. II at

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<sup>3</sup> Ms. Servais testified Respondent's restitution of the amounts that it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales and the corrective action Respondent took to ensure that future violations of the PACA would not occur are mitigating circumstances. Ms. Servais further testified Respondent's retention of the salespersons who altered United States Department of

171-90).

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Respondent's principals, Gregory MacClaren and Darrell Moccia, acted responsibly when they became aware of the fraudulent practices of Respondent's salespersons. Respondent took prompt measures to discover all of the United States Department of Agriculture inspection certificates that had been altered and all of the false accounts of sales that Respondent's salespersons had made and to provide restitution to the produce shippers for the underpayments resulting from these altered inspection certificates and false accounts of sales. I agree with Complainant's sanction witness that Respondent's restitution of the amounts it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales is a mitigating circumstance.

Complainant noted that Respondent retained the salespersons who were responsible for the unlawful conduct. However, Respondent did so on the condition that they pay restitution. Respondent fired the one salesperson, Frederick Gottlob, who did not pay restitution. Nonetheless, I agree with Complainant's sanction witness that Respondent's retention of salespersons who altered United States Department of Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance.

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Complainant's sanction witness testified that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA (Tr. Vol. II at 173-74). However, Complainant's sanction witness also testified that she did not know whether a civil penalty would be just as effective a deterrent as the suspension or revocation of a PACA license (Tr. Vol. II at 200). Therefore, while I agree with Ms. Servais' sanction recommendation, I give no weight to her testimony on the deterrent effect of the various sanctions that may be imposed against Respondent.

Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons working for or employed by Respondent, and Norman Olds', Frederick Gottlob's, and Alan Johnston's alteration of United States

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Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance. (Tr. Vol. II at 175, 195.)

Department of Agriculture inspection certificates and making false accounts of sales constitute egregious violations of the PACA. I find Respondent's principals' prompt admission of Respondent's violations of the PACA; efforts to identify all altered United States Department of Agriculture inspection certificates, false accounts of sales, and underpaid suppliers and/or brokers; corrective actions to ensure that violations of the PACA do not occur in the future; and prompt payment of the amounts underpaid as a result of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are mitigating circumstances. Nevertheless, considering the seriousness of Respondent's willful violations, the number of Respondent's willful violations,<sup>4</sup> the 29-month period during which the willful violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

#### **Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209.
2. Pursuant to the licensing provisions of the PACA, license number 740476 was issued to Respondent on September 18, 1974. Respondent's PACA license has been renewed annually.
3. Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia.
4. During the period June 1994 through November 1996, Gregory MacClaren and Darrell Moccia, and Respondent's salespersons, Norman Olds, Frederick Gottlob, Alan Johnston, and Daniel Schmidlin, bought and sold perishable agricultural commodities for Respondent. The salespersons were paid by commission.
5. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds, Frederick Gottlob, and Alan Johnston, made false

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<sup>4</sup>Ms. Servais testified that in no previous case had the United States Department of Agriculture discovered as many altered United States Department of Agriculture inspection certificates as it discovered during the investigation of this case (Tr. Vol. II at 189).

and misleading statements in connection with interstate transactions in perishable agricultural commodities by altering 53 United States Department of Agriculture inspection certificates involving 49 transactions to underpay 22 of Respondent's suppliers and/or brokers in amounts totaling \$130,903 as set forth in Appendix A of this Decision and Order.

6. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds and Frederick Gottlob, made eight false accounts of sales to underpay seven suppliers in amounts totaling \$6,599.19 as set forth in Appendix B of this Decision and Order.

7. Respondent's owners, Gregory MacClaren and Darrell Moccia, did not know, but should have known, during the period June 1994 through November 1996, that the United States Department of Agriculture inspection certificates, referenced in paragraph 5 of these Findings of Fact, were altered and that the false accounts of sales, referenced in paragraph 6 of these Findings of Fact, were made.

8. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, first learned of the altered United States Department of Agriculture inspection certificates referenced in paragraph 5 of these Findings of Fact and the false accounts of sales referenced in paragraph 6 of these Findings of Fact.

9. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, took prompt action to provide restitution to the suppliers and/or brokers who were underpaid because of the altered United States Department of Agriculture inspection certificates and false accounts of sales.

#### **Conclusion of Law**

Respondent's alterations of 53 United States Department of Agriculture inspection certificates and making of eight false accounts of sales, for a fraudulent purpose, constitute repeated, flagrant, and willful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Complainant raises six issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ's failure to conclude that Respondent's violations of the PACA were willful, is error (Complainant's Appeal Pet. at 5-7). Respondent argues that willfulness is irrelevant (Respondent's Opposition to Complainant's Appeal Pet. at 1 n.1).

I agree with Complainant's contention that the Chief ALJ erroneously failed to conclude that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) were willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil

intent, or done with careless disregard of statutory requirements.<sup>5</sup> The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, intentionally altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob, for a fraudulent purpose, intentionally made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees willfully placed on United States Department of Agriculture inspection certificates and accounts of sales are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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<sup>5</sup> See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), appeal dismissed, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), appeal dismissed sub nom. *Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), appeal dismissed, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), aff'd, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), cert. denied, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), aff'd, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), aff'd, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), aff'd, 104 F.3d 139 (8th Cir. 1997), cert. denied sub nom. *Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’") The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word “willfulness,” as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Respondent's employees Norman Olds, Frederick Gottlob, and Alan Johnston were acting within the scope of their employment when they willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the willful violations by Respondent's employees are deemed to be willful violations by Respondent.<sup>6</sup> Therefore, in this Decision and Order, I restate the Chief ALJ's Initial Decision and Order to reflect my conclusion that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are willful.

I reject Respondent's argument that willfulness is irrelevant. Respondent's willfulness has a direct bearing on the sanction which I impose for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated and flagrant. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 29-month period during which Respondent committed the violations.<sup>7</sup>

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<sup>6</sup> See *In re Jacobson Produce, Inc.*, 53 Agric. Dec. 728 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 1996).

<sup>7</sup> See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating that violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding that 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations

Second, Complainant contends the Chief ALJ erred in finding that Respondent and its owners, Gregory MacClaren and Darrell Moccia, “did not know, and should not have known,” that United States Department of Agriculture inspection certificates were altered or that false accounts of sales were made (Complainant’s Appeal Pet. at 8-13). In response, Respondent states the Chief ALJ’s findings of fact and credibility determinations are “supported by substantial evidence and entitled to great weight” (Respondent’s Opposition to Complainant’s Appeal Pet. at 1 n.1).

I agree with Complainant’s contention that Respondent knew of the alterations of 53 United States Department of Agriculture inspection certificates and the making of eight false accounts of sales. The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements that Respondent’s employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee’s agents and employees. Respondent’s employees Norman Olds, Frederick Gottlob, and Alan Johnston were acting within the scope of their employment when they knowingly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing violations by Respondent’s employees are deemed to be knowing violations by Respondent.<sup>8</sup>

I agree with the Chief ALJ’s finding that Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before they were

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to be “flagrant” violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

<sup>8</sup> See note 6.



discovered during a United States Department of Agriculture investigation in December 1996. However, I find that Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during the United States Department of Agriculture investigation and, in this Decision and Order, I restate the Chief ALJ's Initial Decision and Order to reflect my finding and to provide my reasons for this finding.

Third, Complainant contends the Chief ALJ erred in failing to find that Respondent's violations were egregious violations for which license revocation would be the appropriate sanction (Complainant's Appeal Pet. at 13-15).

The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for egregious violations of the PACA is revocation or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a \$50,000 civil penalty for its 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a \$50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of \$137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.<sup>9</sup> Further, in light of the number of violations, the seriousness of the violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I do not find the mitigating circumstances sufficient to warrant the assessment of a civil monetary penalty rather than the revocation of Respondent's PACA license.

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<sup>9</sup> See *In re Potato Sales, Co., Inc.*, 54 Agric. Dec. 1220, 1233 (1995) (revoking the respondent's PACA license for willfully, repeatedly, and flagrantly misrepresenting the origin of apples in violation of the PACA despite the respondent's president's and owner's lack of actual knowledge of the violations).

Fourth, Complainant contends the Chief ALJ erred in failing to enter relevant findings of fact. Specifically, Complainant contends the Chief ALJ failed to discuss a number of the transactions in which Respondent made false statements for a fraudulent purpose. (Complainant's Appeal Pet. at 15-16.)

Respondent does not deny that it made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The Chief ALJ concluded that Respondent, by altering 53 United States Department of Agriculture inspection certificates and making eight false accounts of sales, for a fraudulent purpose, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 18). However, the Chief ALJ chose to discuss only examples of the transactions in which Respondent altered United States Department of Agriculture inspection certificates and made false accounts of sales for a fraudulent purpose, rather than to discuss all of Respondent's fraudulent transactions (Initial Decision and Order at 4-5). I do not find the Chief ALJ's failure to discuss additional transactions, in which Respondent made false statements for a fraudulent purpose, error, as Complainant suggests.

Moreover, Complainant contends the Chief ALJ's failure to discuss Steven J. Koran's testimony (Tr. Vol. I at 59-80), Cloyse Edward Little's testimony (Tr. Vol. I at 83-104), Richard Alcocer's testimony (Tr. Vol. I at 105-18), and Jeb Johnson's testimony (Tr. Vol. I 118-29), is error (Complainant's Appeal Pet. at 15-16).

The Administrative Procedure Act requires that each initial decision include findings, conclusions, and the reasons for the findings and conclusions, as follows:

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

. . . .

(c) . . . .

. . . All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

Similarly, section 1.132 of the Rules of Practice defines the word “decision” as follows:

**§ 1.132 Definitions.**

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

*Decision* means: (1) The Judge’s initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge’s (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties[.]

7 C.F.R. § 1.132.

Neither the Administrative Procedure Act nor the Rules of Practice require that an administrative law judge discuss the testimony given by each witness. Therefore, while I quote Steven J. Koran’s testimony and reference Cloyse Edward Little’s testimony in this Decision and Order, I do not find the Chief ALJ erred by failing to discuss the testimony given by Steven J. Koran, Cloyse Edward Little, Richard Alcocer, and Jeb Johnson.

Complainant contends Steven J. Koran’s, Cloyse Edward Little’s, Richard Alcocer’s, and Jeb Johnson’s testimony establish “the key role played by USDA inspection certificates in the industry and the absolute reliance that was placed upon them in the transactions that are the subject of this proceeding” and the Chief ALJ’s “failure to give due consideration to their testimony may have been a significant factor in his selection of sanction in this case” (Complainant’s Appeal Pet. at 16).

While the Chief ALJ did not discuss Steven J. Koran’s, Cloyse Edward Little’s, Richard Alcocer’s, and Jeb Johnson’s testimony, the Chief ALJ concluded that Respondent’s violations of the PACA are serious (Initial Decision and Order at 16). Moreover, the Chief ALJ characterized Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as “egregious,” stated that the definition of the word “egregious” is “outstandingly bad,” and noted that section 14(b) of the PACA (7 U.S.C. § 499n(b)) makes the alteration and falsification of a United States Department of Agriculture inspection certificate a crime (Initial Decision and Order at 12). Therefore, I reject Complainant’s speculation that the Chief ALJ’s assessment of a \$50,000 civil penalty may have been based on the Chief ALJ’s

underestimation of the importance of United States Department of Agriculture inspection certificates to the produce industry.

Fifth, Complainant contends the Chief ALJ erred in failing to accord due deference to the agency's sanction recommendation (Complainant's Appeal Pet. at 16-18). Respondent contends the Chief ALJ was not required to follow Complainant's sanction recommendation (Respondent's Opposition to Complainant's Appeal Pet. at 3).

The Chief ALJ states the United States Department of Agriculture's policy is that "deference is to be accorded to the opinion of a sanction witness who has acquired specialized knowledge of the produce industry." (Initial Decision and Order at 15.)

I disagree with the Chief ALJ's description of the United States Department of Agriculture's sanction policy. The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The United States Department of Agriculture's policy is to give appropriate weight to the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute; it is not to accord deference to the recommendations of any sanction witness who has acquired knowledge of the produce industry, as the Chief ALJ states.

The Initial Decision and Order establishes that the Chief ALJ considered and rejected the sanction recommendation given by Complainant's sanction witness, Ms. Servais. While the Chief ALJ is required to give appropriate weight to recommendations of administrative officials charged with achieving the congressional purpose of the PACA, I agree with Respondent that the Chief ALJ is not required to follow the recommendation of Complainant's sanction witness. It is well settled that the recommendations of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be less, or different, than that recommended by administrative officials.<sup>10</sup> Ms. Servais'

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<sup>10</sup>*In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec.

testimony regarding her recommendation that Respondent's PACA license be revoked includes the basis for her recommendation and her reasons for rejecting Respondent's contention that the assessment of a civil penalty would be appropriate in this case. Ms. Servais' reasons for her recommendation include the number and type of violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, and the amount of money Respondent underpaid its suppliers and/or brokers. (Tr. Vol. II at 171-90.) While I give no weight to Ms. Servais' testimony on the deterrent effect of the various sanctions that may be imposed against Respondent, I agree with Ms. Servais that these factors establish that the assessment of a civil penalty against Respondent is not appropriate. Further, I conclude that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA. Consequently, I revoke Respondent's PACA license.

Sixth, Complainant contends the Chief ALJ erred in failing to provide a rational basis for his selection of a \$50,000 civil penalty (Complainant's Appeal Pet. at 18-19).

I agree with Complainant's contention that the Chief ALJ did not provide a rational basis for his assessment of a \$50,000 civil penalty against Respondent. The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for an egregious violation of the PACA is revocation

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73, 88 (2001) (Decision and Order on Remand), *appeal docketed*, No. 01-3508 (6th Cir. May 12, 2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, No. 00-60844 (5th Cir. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (*per curiam*); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a \$50,000 civil penalty for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a \$50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of \$137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.<sup>11</sup> Further, in light of the number of Respondent's willful violations, the seriousness of Respondent's willful violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

Respondent cites three cases involving the alteration of United States Department of Agriculture inspection certificates in which civil penalties were assessed and states Complainant has not shown that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases (Respondent's Opposition to Complainant's Appeal Pet. at 3 n.2).

I agree with Respondent that in *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished); *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished); and *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay), respondents found to have altered United States Department of Agriculture inspection certificates were assessed civil penalties. Moreover, I agree with Respondent that Complainant failed to show that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases. In addition, Complainant's sanction witness testified that she does not know whether a civil penalty might be just as effective a deterrent as suspension or revocation of a violator's PACA license (Tr. Vol. II at 200).

However, I disagree with Respondent's contention that it should be assessed a

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<sup>11</sup>See note 9.

civil penalty in this case on the basis of the assessment of civil penalties in the three cases which it cites. Two of the cases cited by Respondent, *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished), and *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished), were settled by the issuance of consent decisions. The Judicial Officer has long held that consent orders are given no weight in determining the sanction in a litigated case.<sup>12</sup> In a case in which the parties agree to the entry of a consent decision, there is generally no record or argument to establish the basis for the sanction. The sanction may appear to be less than warranted because of problems of proving the allegations of the complaint or because of unrevealed mitigating circumstances. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause the sanction in a consent decision to appear less severe than appropriate. Conversely, the sanction in a consent decision may seem more severe than appears warranted because of unrevealed aggravating circumstances. Thus, I do not find that sanctions agreed to by parties and embodied in consent decisions are relevant to the issue of whether a sanction assessed in a litigated case is appropriate.

In the only litigated case cited by Respondent, *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994), the Judicial Officer suspended the respondents' PACA licenses for 90 days for false and misleading statements made for a fraudulent purpose by means of altering seven United States Department of Agriculture inspection certificates. After appeal to the United States Court of Appeals for the Second Circuit, the parties agreed to the modification of the order in *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994), and in accordance with their Joint Motion to Modify Order, I assessed Jacobson Produce, Inc., a \$90,000 civil penalty. *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay). I find, just as with a consent decision, there is no record or argument to establish the basis for the sanction modification agreed to by the parties in *In re Jacobson Produce, Inc.* Therefore, I do not find the sanction agreed to by the parties in *In re Jacobson Produce, Inc.*, and embodied in *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay), should be given any weight in determining the sanction to be imposed in this proceeding.

For the foregoing reasons, the following Order should be issued.

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<sup>12</sup>See *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 155 (1992), *aff'd sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 14, 1998), *printed in*, 57 Agric. Dec. 841 (1998), *aff'd*, No. 98-16766 (9th Cir. Feb. 8, 2000); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974); *In re Dean Witter & Co.*, 33 Agric. Dec. 11, 13 (1973).

**ORDER**

Respondent's PACA license is revoked. The revocation of Respondent's PACA license shall become effective 60 days after service of this Order on Respondent.

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### APPENDIX A: ALTERED INSPECTIONS

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
43260	Dole Fresh Vegetables, Inc., Salinas, California	M-889371-1	8/16/94	6	Lot A - Decay (average defects) Lot A - Decay (serious damage) Lot A - Statement Added to Decay Lot A - Checksum (average defects) Lot A - Checksum (serious damage) Remarks/Grade	<b>Invoice/Price:</b> \$3882.25 <b>Credit/Payment:</b> (\$2494.75) <b>Gain:</b> \$1387.50
43262	Dole Fresh Vegetables, Inc., Salinas, California	M-908010-2	8/16/94	2	Lot A - Soft rot (average defects) Lot A - Checksum (average defects)	<b>Invoice/Price:</b> \$4165.50 <b>Credit/Payment:</b> (\$2916.00) <b>Gain:</b> \$1249.50
43283	Steinbeck Country Marketing Inc. Salinas, California	M-908091-2	8/25/94	2	Temperatures (2)	<b>Invoice/Price:</b> \$2839.20 <b>Credit/Payment:</b> (\$1271.50) <b>Gain:</b> \$1567.70
43330	Fresh Western Marketing, Inc. Salinas, California  JJ Marketing Co. Chualar, California	M-908208-2	8/25/94	2	Temperatures (2)	<b>Invoice/Price:</b> \$6186.00 <b>Credit/Payment:</b> \$552.50 <b>Gain:</b> \$6738.00  <b>Brokerage fee ret'd:</b> \$212.50 <b>Gain:</b> \$212.50

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
44420	Varsity Produce Sales, Inc., Bakersfield, California	M-909716-3	2/20/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$3316.70 <b>Credit/Payment:</b> (\$1295.75) <b>Gain:</b> \$2020.95
44494	Teixeira Farms, Inc. Santa Maria, California	M-909861-7	3/7/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$2313.00 <b>Credit/Payment:</b> (\$997.00) <b>Gain:</b> \$1316.00
44589	Merrill Farms Salinas, California	M-909991-2	3/20/95	6	Temperatures (2) Decay (average defects) Decay (serious damage) Checksum (average defects) Checksum (serious damage)	<b>Invoice/Price:</b> \$10325.80 <b>Credit/Payment:</b> (\$8813.80) <b>Gain:</b> \$1512.00
44642	The Players Sales, Inc. Blythe, California	M-910136-1	3/27/95	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$5581.80 <b>Credit/Payment:</b> (\$4321.80) <b>Gain:</b> \$1260.00
44861	Merrill Farms Salinas, California	M-910349-0 M-910477-9	4/24/95 4/24/95	2 2	Temperatures (2) Temperatures (2)	<b>Invoice/Price:</b> \$10515.10 <b>Credit/Payment:</b> \$266.00 <b>Gain:</b> \$10781.00

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
44871	Dole Fresh Vegetables, Inc. Salinas, California	M-910462-1	4/24/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$22575.00 <b>Credit/Payment:</b> (\$6935.00) <b>Gain:</b> \$15640.00
45041	Tanimura & Antle, Inc. San Francisco, California	M-910621-2	5/11/95	1	Number of Containers	<b>Invoice/Price:</b> \$5658.50 <b>Credit/Payment:</b> (\$828.50) <b>Gain:</b> \$4830.00
45131	Growers Vegetable Express Salinas, California	M-910845-7	5/23/95	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$1865.75* <b>Credit/Payment:</b> \$378.00 <b>Gain:</b> \$2243.75
45245	Tanimura & Antle, Inc. San Francisco, California	M-910937-2	6/5/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8070.00 <b>Credit/Payment:</b> (\$ 1868.40) <b>Gain:</b> \$ 6201.60
45269	Tom Bengard Ranch, Inc. Salinas, California	M-910983-6	6/5/95	1	Temperatures (1)	<b>Invoice/Price:</b> \$ 5386.00 <b>Credit/Payment:</b> (\$ 4636.00) <b>Gain:</b> \$ 750.00

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
45290	Tanimura & Antle, Inc. San Francisco, California	M-911039-6	6/12/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 4748.50 <b>Credit/Payment:</b> (\$ 250.30) <b>Gain:</b> \$ 4498.20
45458	Dole Fresh Vegetables, Inc. Salinas, California	M-911285-5	6/30/95	3	Temperatures (2) Other (comments)	<b>Invoice/Price:</b> \$ 6359.50 <b>Credit/Payment:</b> (\$ 3508.30) <b>Gain:</b> \$ 2851.20
45625	C & V Farms Watsonville, California	M-911464-6	7/26/95	2	Lot A - Temperatures (2)	<b>Invoice/Price:</b> \$ 3159.25 <b>Credit/Payment:</b> \$ 844.50 <b>Gain:</b> \$ 4003.75
		M-911615-3	8/2/95	2	Temperatures (2)	
45912	Tom Bengard Ranch, Inc. Salinas, California	K-162638-1	9/12/95	1	Applicant	<b>Invoice/Price:</b> \$ 1893.45 <b>Credit/Payment:</b> (\$1292.85) <b>Gain:</b> \$ 600.60
46135	Green Gro Gonzales, California	K-162860-1	10/9/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 1968.00 <b>Credit/Payment:</b> (\$ 988.80) <b>Gain:</b> \$ 979.20

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
46446	Tanimura & Antle, Inc. San Francisco, California	K-163146-4	11/14/95	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 4223.50 <b>Credit/Payment:</b> (\$ 2263.50) <b>Gain:</b> \$ 1900.00
46912	E. Schaffner Packing, Inc. El Centro, California	K-163644-8	1/11/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8336.35 <b>Credit/Payment:</b> (\$ 1661.50) <b>Gain:</b> \$ 6674.85
46985	Anderson Farms Huron, California	K-163725-5	1/16/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1345.20* <b>Credit/Payment:</b> (\$ 228.00) <b>Gain:</b> \$ 1117.20
46989	Yurosek Marketing, Inc. Bakersfield, California	K-075735-1	1/22/96	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 4221.60 <b>Credit/Payment:</b> (\$ 3101.65) <b>Gain:</b> \$ 1120.00
47210	Dole Fresh Vegetables Inc. Salinas, California	K-164090-3	2/15/96	3	Lot B - Discoloration (average defects) (2) Lot B - Checksum (average defects)	<b>Invoice/Price:</b> \$ 6678.00* <b>Credit/Payment:</b> (\$ 3561.60) <b>Gain:</b> \$ 3116.40

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
47244	Anderson Farms Huron, California	K-164124-0	2/21/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 960.00 <b>Credit/Payment:</b> (\$ 423.00) <b>Gain:</b> \$ 537.00
47259	Hansen Fruit & Cold Storage Co., Inc. Yakima, Washington	K-164203-2	2/23/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1470.00* <b>Credit/Payment:</b> (\$ 808.50) <b>Gain:</b> \$ 661.50
47415	E. Schaffner Packing, Inc. El Centro, California	K-164430-1	3/18/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 3410.55 <b>Credit/Payment:</b> (\$ 1237.75) <b>Gain:</b> \$ 2172.80
47432	E. Schaffner Packing, Inc. El Centro, California	K-164467-3	3/19/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 3099.60 <b>Credit/Payment:</b> (\$ 1386.00) <b>Gain:</b> \$ 1713.60
47507	Durant Distributing, Inc. Santa Maria, California	K-163381-4	3/25/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 183.75* <b>Credit/Payment:</b> \$ 115.75 <b>Gain:</b> \$ 299.50

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
47521	Anderson Farms Huron, California	K-164560-5	3/29/96	1	Number of C Containers	<b>Invoice/Price:</b> \$ 3480.00 <b>Credit/Payment:</b> (\$ 592.50) <b>Gain:</b> \$ 2287.50
47657	Anderson Farms Huron, California	K-164658-7	4/8/96	2	Temperatures (1) Number of C Containers	<b>Invoice/Price:</b> \$ 1415.00 <b>Credit/Payment:</b> (\$ 975.00) <b>Gain:</b> \$ 440.00
47676	Tanimura & Antle, Inc. San Francisco, California	K-164649-6	4/9/96	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 5750.00 <b>Credit/Payment:</b> (\$ 1348.00) <b>Gain:</b> \$ 4402.00
47714	Dole Fresh Vegetables Inc. Salinas, California	K-164712-2	4/15/96	4	Lot A - Temperatures (2) Lot B - Temperatures (2)	<b>Invoice/Price:</b> \$ 11383.50 <b>Credit/Payment:</b> (\$ 5591.50) <b>Gain:</b> \$ 5792.50
		K-164713-0	4/15/96	2	Temperatures (2)	
47737	Dole Fresh Vegetables Inc. Salinas, California	K-164806-2	4/20/96	6	Lot A - Temperatures (2) Lot B - Temperatures (2) Lot C - Temperatures (2)	<b>Invoice/Price:</b> \$ 4815.50 <b>Credit/Payment:</b> (\$ 3689.10) <b>Gain:</b> \$ 1126.40

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
47904	Pacific International Marketing, Inc. Salinas, California	K-164974-8	5/4/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 4368.00
		K-165052-2	5/4/96	2	Temperatures (2)	<b>Credit/Payment:</b> (\$ 2979.20) <b>Gain:</b> \$ 1388.80
47972	C & V Farms Watsonville, California	K-165045-6	5/8/96	6	Lot B - Decay (average defects) Lot B - Decay (serious damage) Lot B - Decay (offsize/defects) Lot B - Checksum (average defects) Lot B - Checksum (serious damage) Lot C - Number of Containers	<b>Invoice/Price:</b> \$ 4159.50 <b>Credit/Payment:</b> ( 2530.75) <b>Gain:</b> \$ 1628.75
48075	Mills Distributing Company Salinas, California	K-165244-5	5/21/96	8	Temperatures (2) Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage) Number of Containers	<b>Invoice/Price:</b> \$ 5314.75 <b>Credit/Payment:</b> (\$ 4864.75) <b>Gain:</b> \$ 450.00



<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
48085	C & V Farms Watsonville, California	K-165099-3	5/22/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 4617.29 <b>Credit/Payment:</b> (\$ 1126.00) <b>Gain:</b> \$ 3491.25
48173	Yurosek Marketing, Inc. Bakersfield, California	K-165174-4	6/3/96	2	Lot A - Discoloration (average defects) Lot A - Checksum	<b>Invoice/Price:</b> \$ 5904.00 <b>Credit/Payment:</b> ( 5038.60) <b>Gain:</b> \$ 865.40
48248	Ocean Valley Sales Salinas, California	K-165402-9	6/6/96	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$ 9061.55 <b>Credit/Payment:</b> (\$ 4188.50) <b>Gain:</b> \$ 4873.05
48358	Durant Distributing Inc. Santa Maria, California	K-165323-7	6/19/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 840.00 <b>Credit/Payment:</b> (\$ 160.00) <b>Gain:</b> \$ 680.00
48452	Merrill Farms Salinas, California	K-165656-0	6/28/96	3	Temperatures (2) Number of Containers (3)	<b>Invoice/Price:</b> \$ 1128.75 <b>Credit/Payment:</b> (\$ 796.25) <b>Gain:</b> \$ 332.50

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
48454	Mills Distributing Company Salinas, California	K-165514-1	7/2/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1109.25 <b>Credit/Payment:</b> (\$ 768.00) <b>Gain:</b> \$ 341.25
48796	Neil Bassetti Farms Greenfield, California	K-166059-6	8/13/96	8	Temperatures (2) Number of Containers Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage)	<b>Invoice/Price:</b> \$ 4439.00 <b>Credit/Payment:</b> (\$ 1415.00) <b>Gain:</b> \$ 3024.00
48802	Mills Distributing Company Salinas, California	K-166052-1	8/12/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 2091.00 <b>Credit/Payment:</b> (\$ 1627.25) <b>Gain:</b> \$ 463.75
48873	Neil Bassetti Farms Greenfield, California	K-259824-1	8/23/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 2156.50 <b>Credit/Payment:</b> (\$ 1972.75) <b>Gain:</b> \$ 183.75

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48999	Mills Distributing Company Salinas, California	K-260005-4	9/18/96	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$ 2017.00 <b>Credit/Payment:</b> (\$ 1282.00) <b>Gain:</b> \$ 735.00
49178	Fresh Western Marketing, Inc. Salinas, California	K-260186-2	10/14/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8073.50 <b>Credit/Payment:</b> ( \$1857.50) <b>Gain:</b> \$ 6216.00
49336	Mills Distributing Company Salinas, California	K-260398-3	11/6/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 4019.50 <b>Credit/Payment:</b> (\$ 1794.70) <b>Gain:</b> \$ 2224.80

#### Definitions

Invoice: price listed on invoice from supplier to Respondent.

Price: where price was not agreed upon by Respondent and its supplier, price is calculated as Market News price reduced by freight cost, broker's fee, and Respondent's profit or commission.

Credit: payment made by supplier to Respondent or credit claimed by Respondent on another invoice because of losses on the listed transaction.

Payment: partial payment made by Respondent towards the invoice or price; indicated by "( )"

Gain: total gain realized by Respondent on the listed transaction.

<b>HCM FILE #</b>	<b>SELLER/BROKER</b>	<b>REPORTED GROSS PROCEEDS</b>	<b>REPORTED EXPENSES</b>	<b>REPORTED NET PROCEEDS</b>	<b>ACTUAL GROSS PROCEEDS</b>	<b>ACTUAL EXPENSES</b>	<b>ACTUAL NET PROCEEDS</b>	<b>DIFFERENCE</b>
44420	Varsity Produce Sales, Inc. Bakersfield, California	\$1904.00	\$1694.55	\$209.45	\$2476.00	\$1548.35	\$927.65	\$718.20
44494	Teixeira Farms, Inc. Santa Maria, California	\$2604.00	\$1624.00	\$980.00	\$2500.00	\$1345.00	\$1155.00	\$175.00
44861	Merrill Farms Salinas, California	\$1215.10	\$1481.10	(\$266.00)	\$1953.00	\$1307.50	\$645.50	\$912.50
46912	E. Schaffner Packing, Inc. El Centro, California	\$ 4914.00	\$ 3276.00	\$ 1638.00	\$ 4504.50	\$ 2381.25	\$ 2123.25	\$ 485.25
47521	Anderson Farms, Huron, California	\$ 2232.00	\$ 1639.50	\$ 592.50	\$ 2681.00	\$ 1192.20	\$ 1488.80	\$ 896.30
47972	C & V Farms Watsonville, California	\$ 2613.65	\$ 2040.15	\$ 573.50	\$ 3719.00	\$ 1995.39	\$ 1720.61	\$ 1147.00
48085	C & V Farms Watsonville, California	\$ 4226.25	\$ 3123.75	\$ 1102.50	\$ 5376.50	\$ 2883.75	\$ 2492.75	\$ 1390.25
49336	Mills Distributing Company, Salinas, California	\$ 3283.20	\$ 1512.00	\$ 1771.20	\$3874.00	\$ 1228.15	\$ 2645.85	\$ 874.65

